

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LOUIS A. DALLAN,

Plaintiff,

v.

PUCKETT, et al.,

Defendants.

No. C 07-6293 JSW (PR)

**ORDER OF SERVICE AND  
PARTIAL DISMISSAL;  
DIRECTING DEFENDANTS TO  
FILE DISPOSITIVE MOTION OR  
NOTICE THAT SUCH MOTION IS  
NOT WARRANTED**

**INTRODUCTION**

Plaintiff, a California prisoner, filed this pro se civil rights complaint under 42 U.S.C § 1983. Plaintiff has also filed a motion to proceed *in forma pauperis*, which is GRANTED in a separate order. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves certain claims as set forth below.

**STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:  
2 (1) that a right secured by the Constitution or laws of the United States was violated, and  
3 (2) that the alleged violation was committed by a person acting under the color of state  
4 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### 5 ANALYSIS

6 Plaintiff alleges that Defendant Puckett, a correctional officer at Salinas Valley  
7 State Prison where Plaintiff was formerly housed, withheld his incoming mail in  
8 “retaliation” for Plaintiff’s refusal to stand during a prisoner count. Liberally construed,  
9 this allegation states a cognizable claim for the violation of Plaintiff’s First Amendment  
10 rights. *See Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (providing that prisoners  
11 enjoy a First Amendment right to receive mail). Plaintiff’s allegations do not state a  
12 cognizable retaliation claim, however, because only retaliation for the exercise of a  
13 constitutional right is actionable under 42 U.S.C. § 1983. *See Mt. Healthy City Bd. of*  
14 *Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977). There is no constitutional right to refuse to  
15 stand during a prison count.

16 In addition, Plaintiff’s allegations against Defendant Neott for failing to properly  
17 process his administrative appeals does not state a claim for the violation of Plaintiff’s  
18 constitutional rights. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding  
19 that there is no constitutional right to a prison administrative appeal or grievance  
20 system); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). Accordingly, the retaliation  
21 claim and the claims against Defendant Neott will be dismissed.

### 22 CONCLUSION

23 For the foregoing reasons, the Court orders as follows:

24 1. Plaintiff states a cognizable claim against Defendant Puckett for violating his  
25 First Amendment rights by withholding his legal mail. Plaintiff’s retaliation claims and  
26 his claims against Defendant Neott are DISMISSED. The Clerk shall TERMINATE  
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1 Defendant Neott them from this action.

2 2. The Clerk of the Court shall issue summons and the United States Marshal  
3 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,  
4 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a  
5 copy of this order upon: **Correctional Officer Puckett at Salinas Valley State Prison**  
6 **in Soledad, California.** The Clerk shall also mail a courtesy copy of the complaint, all  
7 attachments thereto, and this order to the California Attorney General's Office and serve  
8 a copy of this order on Plaintiff.

9 3. No later than **sixty (60) days** from the date of this order, Defendants shall  
10 either file a motion for summary judgment or other dispositive motion, or a notice to the  
11 Court that they are of the opinion that this matter cannot be resolved by dispositive  
12 motion. The motion shall be supported by adequate factual documentation and shall  
13 conform in all respects to Federal Rule of Civil Procedure 56.

14 a. If defendants elect to file a motion to dismiss on the grounds that plaintiff  
15 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
16 defendants **shall** do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,  
17 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

18 b. Any motion for summary judgment shall be supported by adequate factual  
19 documentation and shall conform in all respects to Federal Rule of Civil Procedure 56.

20 **Defendants are advised that summary judgment cannot be granted, nor qualified**  
21 **immunity found, if material facts are in dispute. If any defendant is of the opinion that**  
22 **this case cannot be resolved by summary judgment, he shall so inform the Court prior to**  
23 **the date the summary judgment motion is due.**

24 All papers filed with the Court shall be promptly served on the Plaintiff.

25 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
26 served on defendants no later than **thirty (30) days** from the date defendants' motion is  
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1 filed.

2 a. In the event the defendants file an unenumerated motion to dismiss  
3 under Rule 12(b), plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d  
4 1108, 1119-20 & n.4 (9th Cir. 2003):

5 If defendants file an unenumerated motion to dismiss for failure to  
6 exhaust, they are seeking to have your case dismissed. If the motion is  
7 granted it will end your case.

8 You have the right to present any evidence you may have which  
9 tends to show that you did exhaust your administrative remedies. Such  
10 evidence may be in the form of declarations (statements signed under  
11 penalty of perjury) or authenticated documents, that is, documents  
12 accompanied by a declaration showing where they came from and why  
13 they are authentic, or other sworn papers, such as answers to  
14 interrogatories or depositions.

15 If defendants file a motion to dismiss and it is granted, your case  
16 will be dismissed and there will be no trial.

17 b. In the event defendants file a motion for summary judgment, the Ninth Circuit  
18 has held that the following notice should be given to plaintiffs:

19 The defendants have made a motion for summary judgment by which  
20 they seek to have your case dismissed. A motion for summary judgment under  
21 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

22 Rule 56 tells you what you must do in order to oppose a motion for  
23 summary judgment. Generally, summary judgment must be granted when there  
24 is no genuine issue of material fact--that is, if there is no real dispute about any  
25 fact that would affect the result of your case, the party who asked for summary  
26 judgment is entitled to judgment as a matter of law, which will end your case.  
27 When a party you are suing makes a motion for summary judgment that is  
28 properly supported by declarations (or other sworn testimony), you cannot  
simply rely on what your complaint says. Instead, you must set out specific facts  
in declarations, depositions, answers to interrogatories, or authenticated  
documents, as provided in Rule 56(e), that contradict the facts shown in the  
defendants' declarations and documents and show that there is a genuine issue of  
material fact for trial. If you do not submit your own evidence in opposition,  
summary judgment, if appropriate, may be entered against you. If summary  
judgment is granted in favor of defendants, your case will be dismissed and there  
will be no trial.

23 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read  
24 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317  
25 (1986) (holding party opposing summary judgment must come forward with evidence showing  
26 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that

1 failure to file an opposition to defendants' motion for summary judgment may be deemed to be a  
2 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff  
3 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges*  
4 *v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

5 5. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's  
6 opposition is filed.

7 6. The motion shall be deemed submitted as of the date the reply brief is due. No  
8 hearing will be held on the motion unless the Court so orders at a later date.

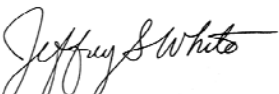
9 7. All communications by the plaintiff with the Court must be served on defendants, or  
10 defendants' counsel once counsel has been designated, by mailing a true copy of the document  
11 to defendants or defendants' counsel.

12 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
13 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is  
14 required before the parties may conduct discovery.

15 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
16 informed of any change of address and must comply with the court's orders in a timely fashion.  
17 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
18 Federal Rule of Civil Procedure 41(b).

19 IT IS SO ORDERED.

20 DATED: April 24, 2008

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JEFFREY S. WHITE  
23 United States District Judge  
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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

DALLAN LOUIS,

Plaintiff,

v.

PUCKETT et al,

Defendant.

Case Number: CV07-06293 JSW


**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 24, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Dallan A. Louis  
P.O. Box 1906  
V78658  
Tehachapi, CA 93581

Dated: April 24, 2008

  
Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk